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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 549.

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR PETITIONER.

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(35,471)

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No. 549.

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, *Petitioner*,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

Statement of the Case.

The only question involved is the construction of Section 1002 of the Revenue Act of 1926 (44 Stat. 110), to determine the proper court of venue to review the decision of the United States Board of Tax Appeals; an agreement having been entered into between the Commissioner of Internal Revenue and the petitioner for review by the Circuit Court of Appeals for the Second Circuit.

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Second Circuit was handed down on June 9, 1930, reported in 42 F. (2d) 192, and the order for mandate was entered on June 16, 1930, and an order recalling and amending order for mandate was entered July 16, 1930.

The court below followed its decision in *Massachusetts Fire and Marine Insurance Company* v. *Commissioner of Internal*

Revenue, 42 F. (2d) 189, the opinion in which case is printed as an appendix to this brief.

Order Extending Time for Application for Writ.

On motion of the petitioner and on September 12, 1930, the Honorable the Chief Justice of the United States entered an order extending the time for the filing of a petition for a writ of certiorari for a period of 60 days from September 16, 1930 (R. 35).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, and Section 1003(a) of the Revenue Act of 1926, 44 Stat. 110.

The date of the judgment to be reviewed is June 16, 1930 (R. 34). The time for the filing of the application for the writ was extended to November 15, 1930 (R. 35). Application for the writ was presented November 15, 1930, and was granted January 5, 1931.

III.

Statement of the Facts.

The petitioner duly filed its return of income and profits taxes for the fiscal years June 30, 1920 and 1921, with the collector of internal revenue at Los Angeles, California.

On November 23, 1925, the petitioner filed with the Board of Tax Appeals a petition for the redetermination of a deficiency in the amount of $6,139.88 for the year June 30, 1921, and on February 6, 1926, the petitioner filed with the Board a petition for the redetermination of a deficiency, in the amount of $7,489.25 for the year June 30, 1920. Thereafter the petitioner filed an amended petition and the causes were consolidated and came on for hearing before the Board and the issues raised in the amended petition and the amended answer were decided

by the Board adversely to the petitioner and the Board on March 16, 1929, entered its orders of redetermination.

On August 2, 1929, there was filed with the Board of Tax Appeals a stipulation of venue in which the parties agreed by their respective attorneys that the decision of the Board might be reviewed by the United States Circuit Court of Appeals for the Second Circuit. The said stipulation of venue reads as follows (R. 23):

> "It is hereby agreed and stipulated by and between the parties in the above entitled cause, by their respective attorneys, that the decision and orders of the United State Board of Tax Appeals in the said cause, dated the 16th of March, 1929, redetermining the amount of income and profits taxes of the said Troy Motor Sales Company for the fiscal years ending June 30, 1920, and June 30, 1921, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.
>
> This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926."

On August 2, 1929, the petitioner filed with the Board its petition for review of the decisions. The petition was for review by the United States Circuit Court of Appeals for the Second Circuit. On the same day a copy of the petition was served on the respondent.

The cause came on for a hearing before the United States Circuit Court of Appeals for the Second Circuit on May 12, 1930, and on June 9, 1930, that court decided that venue could not be stipulated by the parties and entered an order dismissing the petition.

IV.

The Statutes Involved.

The statutes here involved are Sections 1001 (a) and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110), relating to the review of a decision of the Board of Tax Appeals by a circuit court of appeals or by the Court of Appeals of the District of Columbia. The said sections read as follows:

"Sec. 1001 (a). The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 383 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered."

"Sec. 1002. Such decision may be reviewed:

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual) except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in the case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business, or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

V.

Specification of Errors.

(1) The Circuit Court of Appeals for the Second Circuit erred in its construction of Section 1002(d) of the Revenue Act of 1926 and in holding that venue to review the decision of the Board of Tax Appeals could not be conferred on it by stipulation.

(2) The court below erred in refusing to assume and exercise the jurisdiction conferred on it by Section 1002(d) of the Revenue Act of 1926 in the case of an agreement.

VI.

The Argument.

The position of the petitioner is that Section 1002(d) of the Revenue Act of 1926 is to be read, according to its terms and according to well recognized rules of statutory construction as well as recognized rules of grammar, to mean that a decision of the Board of Tax Appeals may, in the case of an agreement, be reviewed by either the Circuit Court of Appeals for the circuit as stipulated, or by the Court of Appeals of the District of Columbia as stipulated. In other words that it is within the power of the parties under subsection (d) to stipulate venue in a circuit court of appeals other than the court for the circuit defined in the preceding subsections of Section 1002.

The court below held in *Massachusetts Fire and Marine Insurance Company* v. *Commissioner*, 42 Fed. (2d) 189, the opinion in which case was adopted in the present case, that the parties could stipulate for review in the Court of Appeals of the District of Columbia but could not stipulate for review by a circuit court of appeals other than that defined in preceding subsections. In reaching this conclusion the court read out of the statute the words "then by the Circuit Court of Appeals for the circuit * * * as stipulated in such agreement" and based its decision on the reasoning that "Congress has never before given such latitude, but had distributed suits in accordance with their territorial incidence" and that the legislative history of Section 1002(d) discloses that the right to stipulate review by a circuit court of appeals is confined to cases in which there is doubt as to the proper court of venue. The petitioner submits that the reasoning of the court below is not sound and that the conclusion reached is in direct conflict with the express terms of the statute.

Section 1002 consists of four separate and distinct subsections. Subsection (a) defines the court of review in the case of an individual. Subsection (b) defines the court of review in the case of a domestic corporation and subsection (c) in the case of a foreign corporation. These three subsections which made up the section as originally introduced in the House as Section 913 of the Revenue Act of 1926, H. R. No. 1, 69th

Congress, 1st Session, define the court of review in the absence of an agreement and, had Congress not amended Section 913 by adding thereto subsection (d) and by passing it as Section 1002, the decision of the court below, that review should have been sought in the Circuit Court of Appeals for the Ninth Circuit, would be correct. Congress did, however, add subsection (d) to the statute and passed it as Section 1002. This appears to have been deliberately done and there appears in the statute and in the legislative history the manifest intent of Congress that the provision for review "in the case of an agreement" is separate and distinct from the review provided for in the preceding subsections, and that the parties can by agreement stipulate the court of review and that in such case the provisions of subsections (a) and (b) have no application.

Subsection (d) is clear on its face and is full and complete. It reads and must be construed to mean that in the case of an agreement the decision of the Board may be reviewed either "by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated * * *" The adverbial clause "by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated," modifies the verb "may be reviewed." The clause is introduced by the preposition "by" which appears before the words "Circuit Court of Appeals" and which is not repeated before the words "Court of Appeals of the District of Columbia." The words "Circuit Court of Appeals for the circuit" and "the Court of Appeals of the District of Columbia" are separated by the conjunction "or." The review may, therefore, by "by" the circuit court of appeals "or" by the Court of Appeals of the District of Columbia. The courts are named in the alternative. The phrase "as stipulated in such agreement" modifies either the circuit court of appeals for the circuit "or" the Court of Appeals of the District of Columbia, whichever is stipulated. Subsection (d) must, therefore, be read to mean that review may be by either the Circuit Court of Appeals as stipulated or the Court of Appeals of the District of Columbia as stipulated, and not to mean by the circuit court of appeals as referred to in subsections (a)

and (b) and as held by the court below. In subsection (d) no reference is made to the preceding subsections and the court below erred in holding that the words "the circuit" mean the circuit of the inhabitance of an individual or the circuit in which is located the collector with whom a corporation return was filed. The court below should have held that "the circuit" is the one stipulated in the agreement. The court below has failed to follow the provisions of the statute and the conclusion reached by it is in direct conflict with the express provisions of subsection (d) of Section 1002.

The court below gave serious consideration to the fact that Congress has apparently departed from the policy of prior legislation with reference to the venue of a cause of action and that Congress has placed no territorial limitations thereon but on the contrary has placed it within the power of the parties to select the circuit and has given the parties "the whole scope of the Union for their choice." In the course of its opinion the court further stated:

> "So far as we know, Congress has never before given such latitude but has distributed suits in accordance with their territorial incidence."

It is true that Section 1002(d) is novel in that it defines venue in the appellate courts and counsel has been unable to find any legislation which parallels it. Other statutes having to do with venue uniformly relate to trial courts. The statute under consideration is, however, one which relates to the review of income and estate tax cases which cover "the whole scope of the Union" and as to which there is no "territorial incidence."

Congress has clearly recognized this in Section 907(a) of the Revenue Act of 1926 with reference to the times and places of sittings of the Board of Tax Appeals which reads as follows:

> "The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable."

It is to be noted that with reference to the times and places of the meetings of the Board that the provision of the statute is expressly stated to be to secure a reasonable opportunity to taxpayers to appear "with as little inconvenience and expense to taxpayers as is practicable." Congress has here expressly stated that the times and places of the meetings of the Board shall conform to the convenience of the taxpayers and the petitioner submits that a like intent appears in Section 1002(d) of the Revenue Act of 1926. There is no territorial incidence in these tax cases except that defined by subsections (a) and (b) of Section 1002 which the petitioner submits must be construed to give way to subsection (d) in the case of an agreement.

It is true that in subsection (a) Congress referred to the inhabitance of an individual but in subsection (b) reference is made to the circuit in which is located the office of the collector to whom the return was made. It is true that corporation returns should be made to the collector in which is located the principal office of the corporation. It is of course often difficult to determine what is the principal office of the corporation and as a practical matter the Commissioner of Internal Revenue has never questioned the right of a corporation to file a return in any particular collector's office. The practice has been for collectors to continue to send out returns to corporations from whom returns were received in prior years with the result that many corporations have continued to file returns in districts not strictly proper, and had subsection (d) not been added to Section 1002 and had corporations been required to seek review in the circuits in which the returns were filed great inconvenience would have resulted in many cases.

Section 1002 relates to the court of review and defines venue in such case. It does not define the venue of a trial court and the questions relating to the expense of producing witnesses and other expenses and inconveniences incidental to the trial of a case not present. Section 1002 has to do merely with appellate procedure and attendance is required of attorneys only. A clear illustration of the necessity for the enactment of subsection (d) and the wisdom in doing so appears in the cases of *Trustees for Ohio and Big Sandy Coal Company* v. *Com-*

missioner, 43 F. (2d) 782, decided September 19, 1930, and *United Thacker Coal Company* v. *Commissioner*, decided January 2, 1931, by the Circuit Court of Appeals for the First Circuit, not reported but cited in Prentice-Hall Federal Tax Service, 1931, page 576. These cases were consolidated and heard together before the Board of Tax Appeals, 15 B. T. A. 273, and then in the absence of an agreement, one was appealed to the First Circuit and the other to the Fourth Circuit with the result that directly opposite conclusions were reached by the two courts on one of the principal questions involved, that of affiliation.

The court below referred to the Congressional history of Section 1002 and to the references made in both the House and Senate Reports to cases of doubt as to the proper court of venue and the court concluded that subsection (d) should be confined to such cases of doubt.

The legislative history of Section 1002 shows that it was originally introduced as Section 913 of the Revenue Act of 1926, entitled "Court Review of Board's Decision," H. R. No. 1, 69th Congress, 1st Session, and was comprised of what is now substantially subsections (a), (b) and (c) of Section 1002. The section was amended in the Senate by changes in subsection (b), not here material, and by adding thereto subsection (d).

The Reports of the House and Senate read as follows:

House Report No. 1, at page 19:

> "Court review—Venue.—Under section 912 of the proposed new law the taxpayer is given the right to obtain a review of the board's decision (whether determining a deficiency, dismissing on motion a petition, or assessing damages for frivolous appeal) by the Circuit Court of Appeals of the United States or the Court of Appeals of the District of Columbia. The venue on review in any particular case is designated as follows: (1) In the case of an individual the test is the same as for venue under section 51 of the Judicial Code, except that in the case of the nonresident individual, the decision will be reviewed by the Court of Appeals of the District of Columbia; (2) in the case of partnerships, associations, corporations, trusts, and estates, the review will be given by the court for the

circuit in which is located the office of the collector to whom the return was made, a provision similar to that for venue in suits for refunds; and (3) in the case of non-resident or foreign corporations, the Court of Appeals of the District of Columbia will review the decision. The above provisions as to venue relieve the difficulties involved in joint returns and determination of the principal place of business, and further prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized."

Senate Report No. 52, at page 36:

"Court review—Venue.—Under the House bill, in cases of corporations, a decision of the board was to be reviewed, in case no return was made, by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. Because of the indefiniteness of the law prescribing where a return should be filed, the committee amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia. A provision is also inserted permitting the commissioner and the taxpayer, whether individual or corporation, to stipulate the court to which the review will be taken, in order that any doubt as to the proper court may be removed by stipulation, whether before or after the petition is filed."

House Report No. 356—Conference Report at page 54:

"Amendment No. 151: Under the House bill, in case of a corporation which had failed to make a return, a decision of the board would be reviewed by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. The amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia, and also provides that the Commissioner and the taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court; and the House recedes."

The petitioner submits that there appears in the legislative history of the section and in the comments of the Committees

nothing to support the conclusion of the court below that the right to stipulate venue is confined to cases of doubt, but on the contrary there appears the intent of Congress that the Commissioner and the taxpayer may, to use the words of the conferees, "in any case, stipulate the court to which review may be taken, * * *."

It is true that in the reports of the Committees of the House and Senate statements appear to the effect that the stipulation is in order that any doubt as to the proper court may be removed. The reference to the removal of the doubt as to the proper court is merely an expression of a motive on the part of Congress for the legislation and not a part of the legislation nor to be read into the statute as a limitation on the right to stipulate "in any case."

The quotation from the House Report, No. 356, page 54, by the court below is not complete and fails to give the full meaning of the Committee which is that the amendment provides for venue in the case of a corporation which failed to make a return "and also provides that the Commissioner and the taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court * * *."

Conclusion.

The petitioner submits that Section 1002 (d) is, according to its express terms, to be construed to mean that, in the case of an agreement, the review of the decision of the Board of Tax Appeals may be by either the Circuit Court of Appeals for the circuit or by the Court of Appeals of the District of Columbia as stipulated, and that the legislative history of the section discloses that Congress intended that the parties may so stipulate in any case.

Respectfully submitted,

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APPENDIX

Massachusetts Fire and Marine Insurance Company, Petitioner, v. Commissioner of Internal Revenue, Respondent.

United States Court of Appeals for the Second Circuit. Decided June 9, 1930, 42 F. (2d) 189.

Before L. Hand, Chase, and Mack, Circuit Judges.

L. HAND, Circuit Judge: The taxpayer, a Massachusetts corporation, filed its income tax return for 1920 with the collector of internal revenue in Boston, on which the Commissioner assessed the tax now in dispute. The taxpayer then petitioned the Board of Tax Appeals to review the assessment, and the Board affirmed the Commissioner. Thereupon the taxpayer filed a petition for review in this court, and the parties stipulated in supposed accordance with §1225 (d) of Title 26 of the United States Code that we should hear the case. Our jurisdiction depends upon whether the stipulation covers such a case, the contrary having been held by the Circuit Court of Appeals for the Eighth Circuit in *Spring Canyon Coal Co.* v. *Commissioner*, 38 Fed. (2) 764. Unless the stipulation was within §1225 (d), the case is not properly here, and for obvious reasons we may not decide it because the parties agree.

Section 1225 prescribes those courts of appeal which are to review decisions of the Board. Under subdivision (a), "in the case of an individual" taxpayer, the appeal is to be heard by the Circuit Court of Appeals "for the circuit whereof he is an inhabitant, or if he is not an inhabitant of any circuit then by the Court of Appeals of the District of Columbia." Under subdivision (b) "in the case of a person (other than an individual) except as provided in subdivision (c)," the appeal is to be heard "by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return; or in case such person made no return, then by the Court of Appeals of the District." Subdivision (c) requires the Court of Appeals of the District to hear such cases as arise when a corporation has no "principal place of business, or principal office or agency in the United States." Subdivision (d), that here in question, reads as follows: "In the case of an agreement between the commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement." The question is whether the phrase, "as stipulated in such agreement" gives the parties power in all cases to select their court, regardless of the preceding subdivisions,

or whether it only authorizes a choice between "the Circuit Court of Appeals for the circuit," as defined by the earlier subdivisions, and the Court of Appeals for the District. We agree with our brothers of the Eighth that it means the second, and at the outset we observe, as they did, that it would be an egregious exception to common practice to give suitors the whole scope of the Union for their choice. Such an option may well result in an undesirable distribution of judicial business, a consideration especially applicable to this Circuit to which in any case large numbers of such cases must inevitably fall. So far as we know, Congress has never before given such latitude, but has distributed suits in accordance with their territorial incidence. A contrary purpose ought to be pretty clear, if we are to construe the words otherwise.

They were not happily chosen unless we are right; rather we should expect them to read: "by any Circuit Court of Appeals or the Court of Appeals of the District, as may be stipulated in the agreement." The actual phrase, "by the Circuit Court of Appeals for the circuit," seems to go back to the circuit prescribed in the earlier sub-divisions, and to offer that alone as an alternative to the Court of Appeals of the District. It is true that this involves an interpolation so that the clause reads: "by the Circuit Court of Appeals for the circuit as heretofore defined"; but the liberty so taken with the text is altogether consonant with the purpose of the section as a whole. Indeed, were the matter to be left at large to the consent of the parties, we should expect the broad consent to stand at the outset, and provision for those cases in which the parties could not agree, to follow.

The reasons which might have prompted giving any choice were, so far as we can see, two; first the convenience of the parties, and second, the settlement of doubts as to jurisdiction. The first would plainly limit the choice between the District, always the most accessible to the commissioner, and the place where the taxpayer lived, or had its principal office, if a corporation. To admit a wider choice would recognise motives which we can scarcely suppose would have had the ear of Congress. In fact, however, as the history of the section shows, the convenience of the parties had nothing to do with the matter but the removal of doubts. In the case of an individual these might be very real, for "inhabitancy" is a troublesome issue, as the books prove. It is true that subdivision (b) sets a test which seems too clear for question, but subdivision (c) could raise doubts, like those which have caused so much litigation as to personal service on corporations. The parties might in such case go to the District, as in cases where no corporate

return was filed, thus avoiding any question; or they might select the circuit where the taxpayer was thought to live, or to have its principal office, if a corporation, in which event the stipulation would avoid nice questions as to its propriety. We can not suppose that under color of laying doubts, it was intended to allow them to go to a court which nobody claimed to have any jurisdiction under the earlier subdivisions.

When originally introduced in the House the section did not contain subdivision (d) at all, and provided, in the case of a corporation which made no return, that the review should be by that Circuit Court of Appeals where the return should have been filed, (§992 (b) of Title 26). The accompanying committee report, (House Reports, Vol. I, Report No. 1, 69th Congress, 1st Session, p. 19), declared that the first subdivision was drawn to accord with the test laid down in section 51 of the Judicial Code, "inhabitancy," as was apparent; that the second was to make the place of return the test for corporations and the like; and the third, to give the Court of Appeals of the District jurisdiction only in the case of non-resident or foreign corporations. The report concluded: "The provisions as to venue * * * prevent undue burdens upon those circuits embracing States in which a vast number of corporations are organized."

The Senate Committee in its report (Senate Reports, Vol. 1, Report No. 52, 69th Congress, 1st Session, p. 36), thought that difficulty would arise in determining where returns ought to be filed by corporations which filed none, and gave such cases to the District. They added subdivision (d), which permitted "the commissioner and taxpayer, whether individual or corporation, to stipulate the court to which the review may be taken, in order that any doubt as to the proper court may be removed by stipulation, whether before or after the petition is filed." While it is true that, read broadly, this appears to give an unlimited choice, it is apparent that the purpose was no more than to remove doubts as to the "proper court." This seems to us to circumscribe the meaning, and to accord with the view which we take. Certainly it can not be argued that it was necessary to open all ten circuits, in order to put the jurisdiction beyond question.

The House receded as to both amendments, and its conferees' report, (House Reports, Vol. 1, 69th Congress, 1st Session, Report No. 356, p. 54), concludes almost in the words of the Senate Report: "the commissioner and taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court." The implica-

tions appear to us the same, and in any event we should hesitate to ascribe to the conferees a departure from the original purpose of the House to prevent an unequal distribution of appeals; a purpose which our own experience already leads us to believe may be frustrated, if the language of the report be broken from its setting. Our conclusion is that while nothing very positive is to be gained from the committee reports, it is at least apparent that the declared aim of subdivision (d) is completely secured by limiting the choice between circuits where the taxpayer has some color of residence, and the District of Columbia.

A similar case was before us in *Greylock Mills* v. *Commissioner*, 31 Fed. (2) 655, but we failed to observe the point, and neither side called it to our attention. Others are now before us which must follow this ruling. In saying that the question was decided in *Spring Canyon Coal Co.* v. *Commissioner*, we do not forget that the case eventually went off upon another point. That does not destroy the force of the reasoning there used.

While we are loath to dispose of the case on this ground, it is perhaps not improper to say that the petitioner has in fact lost nothing by our failure to decide the case upon the merits.

Petition to review dismissed for lack of jurisdiction.